No. 97-1684

(3)

Supreme Court, U.S.
FILED
MAY 26 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF PETITIONER

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INTRODUCTION

Respondent's brief in opposition seeks to obscure the central issue in this case: whether the public forum doctrine requires courts to examine the objective characteristics of a forum and the government's actual practice in implementing its asserted policy, or whether the doctrine permits a court to accept the government's *post hoc* assertion of an unwritten policy and ignore objective evidence of contrary practices under that same policy.

This is not, as respondent suggests, a mere disagreement about how the court of appeals applied settled law to the

facts, but a fundamental question going to the legal scope and meaning of the public forum doctrine. As Justice Kennedy has observed, "[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring). The court of appeals' approach to the public forum doctrine drains the doctrine of its vitality, and deprives it of any speech-protective function.

I. THE PANEL'S DECISION TO TREAT AS LEGALLY IRRELEVANT TO PUBLIC FORUM ANALYSIS THE GOVERNMENT'S APPLICATION OF THE CHALLENGED POLICY AND THE NATURE OF THE FORUM RENDERS THE PUBLIC FORUM DOCTRINE A RUBBER STAMP OF GOVERNMENT DECISIONS

The court of appeals determined that Amtrak had not created a public forum because it had "never opened the Spectacular for anything except purely commercial advertising." Pet. App. 10a. In order to reach this conclusion, the court deemed legally irrelevant undisputed evidence that Amtrak had displayed noncommercial advertisements under the same policy that governed the Spectacular.

The legal issue squarely presented, then, is whether public forum doctrine permits a court to ignore evidence of inconsistent past practice in assessing the nature of the forum. Amtrak concedes that its policy against political advertising, which it asserted in rejecting petitioner's ad, applies not just to the Spectacular bulletin board, but to all Penn Station advertising. Br. in Opp. 9. And the district court found that under that same policy Amtrak had permitted the display of numerous noncommercial ads throughout Penn Station. Pet. App. 20c. Thus, as Judge Jon O. Newman pointed out in dissent, "[t]he majority has concluded that the policy has been

consistently applied by overlooking the instances where it has not been consistently applied."[1] Pet. App. 5b.

The court of appeals' decision to ignore objective evidence of Amtrak's inconsistent practices with respect to political speech was neither an oversight nor a mere error in applying the law to the facts. The panel was fully aware of the contrary evidence, but deemed it legally irrelevant to the public forum inquiry.[2]

Moreover, the court below also treated as legally irrelevant objective evidence regarding the nature of the forum, including evidence that Penn Station is a major public thoroughfare with which political speech is fully compatible, and in which a wide range of other political speech has been communicated and displayed, without any adverse reactions from Amtrak's

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[1] Amtrak states that the district court "ignored" this Court's public forum doctrine and "failed" to "define the forum at issue, . . . [or] determine whether the Spectacular . . . was a public or nonpublic forum . . . ," Br. in Opp. 7, without mentioning that public forum analysis was not necessary to the district court's holdings that Amtrak's policy was impermissibly vague, Pet. App. 15c-19c, and, depending on its meaning, might constitute viewpoint discrimination, *id.* 20c-22c. As Judge Newman pointed out, "the public forum view of the majority, even if correct, is irrelevant since, no matter what the scope of the forum, a governmental entity violates the First Amendment when it bars display of political messages pursuant to a 'policy' that has been found . . . to be vague, unwritten, undisseminated, unclear to those who administer it, and inconsistently applied." *Id.* 6b (emphasis supplied).

[2] The panel initially justified its decision to ignore the contrary evidence on its "finding" that Amtrak had separate policies for the Spectacular and the rest of Penn Station. Pet. App. 15a-16a. When Lebron pointed out in a rehearing petition that Amtrak had conceded and the district court had found that the same substantive policy governed both the Spectacular and the rest of Penn Station advertising, the court deleted those references from its opinion, *id.* 3b; and instead sought to justify its refusal to consider the contrary evidence on the ground that "Lebron insisted that TDI display his proposed advertisement only on the Spectacular," *id.*

customers. The court of appeals' decision thus effectively redefined the legal contours of the public forum doctrine.

Nor did this Court's recent decision in *Arkansas Educational Television Comm'n v. Forbes*, 1998 WL 244196 (U.S. Sup. Ct. May 18, 1998), set forth any new principles of public forum analysis that should not already have been known to the court of appeals. In reviewing those settled principles, the Court restated that to create a designated public forum, "the government must intend to make the property 'generally available,' to a class of speakers." *Id.* at *8 (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)). To determine the government's intentions, the Court repeated that it looks to "the policy and practice of the government" and "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at *7 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)). In this case, Amtrak concedes that in making advertising space available throughout Penn Station, including the Spectacular, it employed a single advertising policy applicable to all comers who complied with it. Amtrak's *practice* in applying its policy shows that it did not exclude political advertising, including noncommercial advertising for *The Plain Truth* magazine. Thus, under the reasoning of this Court's past cases as repeated in *Arkansas Educational Television Comm'n*, the exclusion of Lebron's advertisement from the Spectacular because it was "political" should have been subject to strict scrutiny.

Essentially, the court of appeals' decision ignored the constitutional analysis, refusing *as a legal matter* to look beyond the particular bulletin board to which petitioner sought access, and deeming irrelevant all contrary evidence regarding the nature of the forum and the implementation of the asserted policy. Particularly where, as here, the policy is unwritten, such a conception of the public forum doctrine

reduces it to a mere rubber stamp of the government's decision.[3]

Amtrak objects that the court of appeals did look at past practice *with respect to the Spectacular*. Br. in Opp. 14. But that begs the question of what past practices must be examined. As Judge Newman noted in dissenting from the denial of rehearing, Pet. App. 5b-6b, once the panel acknowledged that the same policy governed all Penn Station advertising, Amtrak's implementation of the policy throughout the Station became relevant. Because the same substantive policy governed all Penn Station advertising, by definition any ad displayed in Penn Station—including the *Plain Truth* ads—could have been displayed on the Spectacular.

While no political ad had been previously displayed on the Spectacular, it is also true that no one had ever before asked to display a political ad there; in fact, only a handful of ads had ever appeared there (presumably because of the expense involved). More to the point, but deemed irrelevant by the court of appeals, under Amtrak's asserted policy against political advertising, Amtrak had *never* before refused to display an ad for its political content, and had regularly displayed political, noncommercial ads.

By focusing exclusively on the Spectacular and disregarding as legally irrelevant all objective evidence contravening Amtrak's assertions, the court of appeals' decision conflicts squarely with *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1154 (7th Cir. 1995). In that case, although the union sought access to a single display case in O'Hare Airport's Concourse B, 44 F.3d at 1148, the Seventh

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[3] Amtrak disingenuously suggests that petitioner previously took the position that Amtrak's policy was written, and only now argues that it is "unwritten" and "undisseminated." Br. in Opp. 6 n.4. But petitioner has always criticized the policy as "unwritten." A policy barring "political" ads was reflected in writing in some of Amtrak's old leasing contracts, but as the district court found, none of those contracts was in effect at the time this dispute arose. Pet. App. 15c-16c.

Circuit did not define the forum as one specific display case, nor as Concourse B advertising, but as all O'Hare Airport advertising. As here, the critical fact was that one policy governed all advertising in the transportation facility.

Indeed, the *Air Line Pilots Ass'n* court reversed the district court specifically because it had examined only the 48 display cases in Concourse B, United Airlines' concourse, rather than all O'Hare concourse advertising. *Id.* at 1154. Here, by contrast, the panel majority limited its inquiry to a single display case, the Spectacular, and wholly disregarded the district court's findings that Amtrak had opened other display cases in Penn Station to noncommercial, political advertising *under the same policy*.[4]

Respondents argue that the fact that Lebron sought access specifically to the Spectacular justifies defining the forum as the Spectacular. Br. in Opp. 16-17. But even assuming that the forum is properly defined as the Spectacular, the inquiry into the *nature* of the forum must examine Amtrak's implementation of its asserted policy against political advertising throughout Penn Station, where Amtrak has conceded and the district court has found that one policy governed all Penn Station advertising.

The court of appeals' blindered approach to the public forum doctrine would, as Judge Newman argued in dissent, permit Amtrak to allow the Democratic Party to place political ads on either side of the Penn Station rotunda and then

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[4] Amtrak seeks to characterize the other political ads it displayed as materially different from petitioner's ad. Br. in Opp. 19 n.9. But Amtrak never challenged as clearly erroneous the district court's finding that Amtrak had displayed numerous noncommercial ads in Penn Station. Pet. App. 19c-20c. In light of that undisputed finding, the court of appeals was able to conclude that the forum had never been open "for anything except purely commercial advertising," *id.* 10a, only by treating the district court's finding as legally irrelevant. It is that legal issue, not any dispute about the facts, that petitioner presents here.

deny access to the Spectacular to the Republican Party on the ground that its policy prohibited political advertising. Pet. App. 21a. In other words, the panel's approach would rob the public forum doctrine of any meaningful protection for speech.

The Court should grant the writ to ensure the continued "vitality" of the public forum doctrine, by making clear that courts may not disregard as legally irrelevant objective evidence concerning the nature of the forum and the government's practice in implementing a challenged speech access policy.

II. THE COURT OF APPEALS' DETERMINATION THAT AMTRAK'S POLICY WAS VIEWPOINT-NEUTRAL CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

Lebron argued that Amtrak's conduct in this case was viewpoint-discriminatory in two respects: (1) it permitted the display of the conservative noncommercial *Plain Truth* ad while barring the display of Lebron's liberal ad on the ground that it was noncommercial; and (2) its policy of barring "political" while accepting "commercial" advertisements on the same subject is viewpoint-based under this Court's decisions holding policies against "religious" speech viewpoint-based. Pet. 18-21.

Amtrak's only response to the first argument is to proffer a new theory regarding advertising for publications that finds no support in the record and is contradicted by Amtrak's own officials' testimony.[5] The undisputed fact is that Amtrak dis-

[5] Amtrak now claims that its display of the *Plain Truth* ad was consistent with "the acceptance of advertisements for publications without reference to the publication's content," Br. in Opp. 19 n.9. This assertion is contradicted by Amtrak's own officials' testimony, and does not explain the acceptance of an ad for a purely noncommercial magazine. The Amtrak Vice-President in charge of advertising testified that an ad discussing *Time* magazine's coverage of Mikhail Gorbachev's fall would

played conservative noncommercial ads for *The Plain Truth* in the Penn Station concourse for five years, and then informed Lebron that it would not display his ad in the same concourse because it was noncommercial. A more blatant form of viewpoint discrimination would be difficult to imagine.

As to petitioner's second viewpoint discrimination argument, Amtrak maintains that its policy is viewpoint-neutral because it prohibits political "subject matter," not political viewpoints. But as the undisputed record illustrates, Amtrak consistently permitted the display of ads addressing political "subject matter."

The *Plain Truth* ad displayed at the time Amtrak rejected petitioner's ad addressed the issue of adultery, a subject matter no less "political" than whether consumers should purchase Coors beer because of the causes its owners support.[6] And under Amtrak's policy, an ad with the same subject matter as Lebron's—urging persons not to buy Coors beer—would be permissible if its perspective was commercial rather than political. Pet. App. 24a.

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be barred as "political." DeAngelo Dep. at 308, 314; A835; E306. Amtrak cites only E261 and E347 as support for its newly claimed policy, neither of which even addresses the issue. E261 lists advertisers who displayed ads in Penn Station, and E347 is petitioner's objection to the quality of certain photocopies. And this new claim by Amtrak's lawyers fails to explain how an ad for a purely noncommercial magazine falls within a policy that assertedly permits the display only of commercial ads.

[6] Not only was the *Plain Truth* advertised from a four-sided, seven-foot high kiosk immediately in front of the Spectacular, but the kiosk had bins attached to it containing copies of the magazine for free distribution to the public. Pet. App. 7a, 20c; E202-03.

III. AMTRAK'S POLICY IS UNCONSTITUTIONALLY VAGUE UNDER *HYNES V. MAYOR OF ORADELL*

Amtrak contends that the panel majority's one-sentence determination that Amtrak's policy is not vague is consistent with *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), because in *Hynes* this Court objected to the failure to define "cause," not "political." This reading is disingenuous.

The ordinance *Hynes* invalidated required permits for solicitations "for a Federal, State, County or Municipal political campaign or cause." 425 U.S. at 614 n.1. In declaring the ordinance vague, the Court expressly stated, "nor is political 'cause' defined." *Id.* at 622. Describing the vagueness challenge, the Court stated that "persons canvassing for political causes would be uncertain whether the ordinance covered them." *Id.* at 621 n.5. The constitutional infirmity was that "cause" was modified only by "political," and therefore would-be canvassers were at a loss as to which causes were prohibited. "Political advertising" is no more clear than "political cause," and leaves would-be advertisers to guess as to what is permitted and what is not.

Finally, Amtrak argues that the plurality decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), supports the court of appeals' vagueness determination. Plaintiff in *Lehman* did not present a vagueness challenge, and the plurality does not address the issue. Amtrak nonetheless argues that *Lehman* implicitly supports the result below because the plurality failed to respond to the dissent's contention that the distinction between ideological and nonideological speech was "impossible to draw with accuracy." Br. in Opp. 24. But the plurality expressly relied on the Ohio Supreme Court's narrow construction of the ordinance to distinguish sharply between advertisers seeking to sell a good or service, and all others. 418 U.S. at 303-04. The Ohio Supreme Court's construction may well be a constitutionally discernible line, but it is not the line Amtrak drew. As the district court found, Pet.

App. 16c-19c, Amtrak's unwritten policy meant something different to every official charged with implementing it, and had no sharp lines. That is precisely the problem.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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